UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SENSIENT FLAVORS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:11-CV-1622-JMS-DML**
	)	
INDIANA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, JASON REASON, DONNA JAQUES, KATHLEEN KREISS, JEAN COX-GANSER, CHRIS PIACITELLI, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, and AZITA MASHAYEKHI	)	
	)	
Defendants.	)	

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

The Indiana Occupational Safety and Health Administration ("IOSHA")[1], by counsel, responds to Plaintiff Sensient Flavors LLC's ("Sensient") Motion for Preliminary Injunction as follows:

I. Introduction

On January 12, 2012, Sensient filed a Motion and supporting Brief requesting the Court to preliminarily enjoin IOSHA from continued execution of an Amended Administrative Search Warrant ("warrant") entered in Marion County Court on September 15, 2011, after a contested hearing where Sensient was represented by counsel. (*See* Dkt. 20 pp. 102, Dkt 21, p. 35.) The warrant relates the inspection and investigation of Sensient's facilties by IOSHA in connection

[1] Sensient's request for preliminary injunction, by its terms, appears directly solely at IOSHA. To the extent that Sensient interprets its motion as directed at IOSHA employees, Jason Reason, or Donna Jaques, these individual employees of IOSHA also join in opposing Sensient's request for preliminary injunction.

with food flavoring substances utilized by Sensient that are identified as part of a national emphasis program of the United States Department of Labor's Occupational Safety & Health Administration ("OSHA") as a high priority. (*See* Dkt. 1, ¶ 52; Dkt. 24-9, p. 2; Jason Reason Declaration ¶ 3 attached hereto as **Exhibit A**.) The flavoring substances were investigated by IOSHA to ensure that Sensient's workers are adequately protected from serious physical harm. Sensient contends that it is entitled to a preliminary injunction because the warrants issuance and its execution violate Sensient's constitutional rights. (*See* Dkt. 21 pp. 27-33.) Sensient's complaints regarding the issuance and execution of the warrant have been and are currently before Indiana state courts. (Dkt 1, pp. 23-30.) Sensient's requested preliminary injunction should be denied. First, the Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971) from interfering in ongoing state proceedings where state courts are confronting the same issues as Sensient has placed before this court.[2]

Second, the court should deny Sensient's request to enjoin IOSHA's execution of the warrant because the issue is moot. IOSHA has completed its investigation pursuant to the terms of the warrant and has notified the state trial court that IOSHA will not be undertaking any further searches of Sensient's facilities under the warrant. Execution of the warrant is finished. There is nothing to enjoin.

Even if the requested injunction did not violate *Younger*, and the issue was not moot, Sensient's requested preliminary injunction should still be denied because there is not a reasonable likelihood that Sensient will succeed on the merits of their Section 1983 claims. IOSHA received a warrant that was reasonably limited in time and scope, and IOSHA officials acting in reliance on a judicially issued warrant according to its terms. The warrant was

[2] On the date of this filing, IOSHA is submitting a Motion to Dismiss Sensient's action on *Younger* abstention grounds. IOSHA's Motion to Dismiss is incorporated herein by reference and will not be repeated here.

therefore proper and Reason and Jaques possess qualified immunity, which defeats Sensient's Section 1983 claims. Moreover, as IOSHA is no longer executing on the warrant, Sensient cannot show ongoing irreparable harm or the possibility of future harm.

II. Factual Background

Pursuant to the terms of the warrant, IOSHA tested for certain chemicals identified by the United States Department of Labor's Occupational Health and Safety Administration's National Emphasis Program ("NEP") at Sensient's facility. (See Exhibit A, ¶ 3, Declaration of Donna Jaques ¶ 3 attached hereto as **Exhibit B.**) Sensient was not informed that IOSHA's execution of the warrant on Sensient was a continuation of prior inspections of Sensient by the National Institute for Occupational Safety and Health ("NIOSH"). (*Id.*)

Sensient utilizes certain chemicals included in the NEP in its manufacture of certain food flavorings. (*Id.*) However, based on Sensient's provided production schedules, Sensient does not use every chemical identified on the NEP on a daily basis. (*Id.*) IOSHA was not always able to determine whether or not any of the chemicals would be used on a particular day because Sensient did not always provide production schedules or accurate production schedules showing the chemicals that would be used on particular dates on a timely basis. (*Id.*) As a result, there were a number of days when IOSHA did not test for the chemicals identified in the NEP. (*Id.*) IOSHA could not reasonably test random areas at Sensient without knowledge of whether the chemicals that were subject of the search warrant were being used on a particular day. (*Id.*)

On October 6, 2011, IOSHA took personal air samples of employee's breathing zones in the dry blend area of the Sensient facility. (*Id.* ¶ 5.) At this point in the investigation, Sensient was not cooperating and informing IOSHA when Sensient was running "high priority"

chemicals. (*Id.*) It was later when the Marion County Court ordered Sensient to provide production schedules to IOSHA that proper air sampling techniques and methods could be used. (*Id.*) Many of the flavoring chemicals have different sampling methods and devices used for proper sampling protocol. (*Id.*) Sensient officials, attorneys, and employees informed IOSHA that the dry blend area was used to process "high priority" chemicals. (*Id.*) IOSHA sampled in the dry blend area as a last effort to obtain air sampling data in hopes that Sensient would provide information on the chemicals used that day in the area and that the sampling method utilized was appropriate. (*Id.*) Unfortunately, approximately 4 days later Sensient stated that no "high priority" chemical was run on October 6, 2011 in the dry blend area. (*Id.*) Since the sample was already at the laboratory, the laboratory tested the sample for respirable dust. (*Id.*) This kind of hit and miss sampling was not necessary after receiving production schedules from Sensient as directed by the state trial court. (*Id.*)

IOSHA attempted to cooperate with Sensient in informing them of future testing activity. Warning the target of a search warrant or generally giving a target notice of what they can expect is contrary to accepted practice and state law (Ind. Code § 22-8-1.1-24.2 and 610 IAC 9-2-7) because the execution of a warrant is compromised when targets have advance notice. (*Id.* ¶ 4.) For this reason, IOSHA did not generally provide Sensient with advance notice regarding the specifics of testing activity that IOSHA would be conducting in subsequent days until advanced noticed was authorized by IOSHA's Commissioner pursuant to Ind. Code § 22-8-1.1-24.2 and 610 IAC 9-2-7. (*Id.* ¶ 4.)

However, as a courtesy because Sensient was conducting side by side testing of chemicals used at Sensient's place of business, Sensient was, at times, provided with advance notice of testing by IOSHA in order that Sensient's consultants could set up their testing

equipment. (*Id.* ¶ 6.) This notice was a courtesy only and is not required. (*Id.*) Occasionally, plans deviated from stated intentions based on various logistical factors and Sensient's production schedules. (*Id.*) The deviations from stated schedules were based on evolving facts and production schedules. (*Id.*) IOSHA never made any statements to Sensient regarding testing procedure and dates to deceive Sensient in any way. (*Id.*) In fact, IOSHA provided Sensient's consultants with the sampling method that was used, which is not required. (*Id.*) As a result of IOSHA's courtesy notifications, when notice could be reasonably provided, Sensient attempted to turn IOSHA's voluntary good faith courtesy into a right of advance notice that limited IOSHA's authority to inspect pursuant to the terms of the administrative warrant. (*Id.*) However, advance courtesy notification was only provided by IOSHA when such a courtesy would not adversely affect IOSHA's inspection of Sensient's facility. (*Id.*) There were times when advance notice was simply not practicable based on the circumstances. (*Id.*)

There were times when IOSHA personnel insisted that they be permitted to perform inspections under the administrative warrant in instances where personnel from Sensient or their attorneys were hindering inspection work. (*Id.* ¶ 7.) However, IOSHA personnel were professional and polite at all times. (*Id.*) Following the protocol in the Indiana Field Inspection Reference Manual which is an IOSHA guidance document, IOSHA did at times state that police may be called when Sensient personnel were interfering with inspections. (*Id.*)

IOSHA provided deadlines on document requests because Sensient and their attorneys were not providing any of the documentation specifically requested on document request forms. (*Id.* ¶ 8). This was done to avoid directly inspecting Sensient's filing cabinets so that Sensient and their attorneys could review the documentation before they provided the documents to

IOSHA for trade secret information as they expressed concern for confidentiality of trade secrets. (*Id.*)

There were times when Sensient personnel maintained that certain IOSHA testing equipment that included flash photographs and other electronic equipment were not safe in areas that Sensient stated were flammable areas. (*Id.* ¶ 9.) IOSHA questioned Sensient's statements in this regard because IOSHA observed Sensient personnel and their attorneys also used flash photography and cell phones in the exact same areas at the exact same time and place where Sensient maintained it was unsafe to use such equipment. (*Id.*) Sensient's attorneys and management personnel even continued to use cell phones and flash photography in those areas as recent as the week of February 20th, 2011. (*Id.*) However, after Sensient made such requests, IOSHA ceased using that specific equipment for the rest of that day as Sensient never brought the issue up again and they themselves were using flash photography and cell phones. (*Id.*) Furthermore, Sensient never requested IOSHA to stop using a velometer on October 4, 2011 or on any other date. (*Id.*) Industry standards also indicate that there are no hazards associated with using the velometer, cell phone, calculator, or camera in those areas. (*Id.*)

IOSHA did not prohibit any Sensient personnel or their attorneys to be on Sensient's property during the search. (*Id.*) The only limitation on Sensient personnel and their attorneys placed by IOSHA related to interviews of non-management employees. (*Id.*) Sensient personnel were not entitled to participate in interviews of Sensient production workers so that IOSHA could obtain needed information from the production workers without the intimidating presence of Sensient management and their attorneys. (*Id.*) Indiana law (610 IAC § 9-2-4) authorizes IOSHA to question employees privately during an investigation. (*Id.*)

Union officials and the employees informed IOSHA personnel that they felt like they were being harassed by Sensient and their attorneys after interview statements were taken by IOSHA. (*Id.* ¶ 11.) In interviews with Sensient employees, IOSHA learned that non-management employees were made to believe by Sensient that they needed legal counsel present during IOSHA interviews although IOSHA only has jurisdiction over employers and not employees. (*Id.*)

IOSHA personnel who executed the search warrant never entered Sensient's facility without the knowledge of Sensient. (*Id.* ¶ 12.) IOSHA personnel always went through the front door and always identified themselves on request. (*Id.*) IOSHA officials did not sign in at Sensient's front desk because the sign-in sheet had certain legal disclaimers. (*Id.*) Sensient personnel were informed of the reasons why IOSHA personnel would not sign the sign-in sheet. (*Id.*)

Sensient officials demanded to escort IOSHA personnel everywhere even to the bathroom. (*Id.* ¶ 13.) Reason was unescorted on October 6, 2011 when he wanted to leave for lunch and all of his escorts affiliated with Sensient including Sensient's attorney had left for lunch. (*Id.*) Reason walked from Sensient's office to the lobby and left for lunch. (*Id.*) However, Sensient's secretary was informed that Reason was leaving for lunch and would be back in an hour. (*Id.*)

In conducting the search of Sensient's facility, IOSHA, made every attempt to ensure to conduct the search according to the terms of the warrant issued by the Marion County Court. (*Id.* ¶ 14.) IOSHA did not take any actions at Sensient's facility that was contrary to the terms of the administrative warrant. (*Id.*) IOSHA personnel used their experience and best judgment in conducting the search of Sensient's facility according to the search warrant. (*Id.*)

IOSHA categorically denies that any of Sensient's rights have been infringed in any manner by IOSHA or its employees. The issuance and execution of the warrant was lawful and proper at all times. Sensient's heated constitutional claims are wholly without merit.

III. Argument

A. Sensient's requested preliminary injunction is moot.

Sensient requests a preliminary Injunction to enjoin "IOSHA from continuing to execute its search warrant." (Dkt 21, p. 35.) Sensient's requested preliminary injunction is moot. On February 22, 2011, IOSHA filed a Notice of Execution with the Marion County Superior Court that issued the warrant at issue. A true and accurate certified copy of the Notice is attached hereto as **Exhibit C.**

The Notice of Execution is characterized as a "Notice of full Execution." (*See* Exhibit B.) Because IOSHA has fully executed on the Amended Search Warrant, IOSHA informed the state trial court that "IOSHA will not undertake further searches of Sensient's facilities under the authority of the Amended Search Warrant dated September 15, 2011." (*See* Exhibit B.) In short, IOSHA will conduct no further activities on Sensient's property under the authority of the warrant. Sensient's motion for preliminary injunction should therefore be denied as moot. *See e.g Trugillo v. Simer*, 934 F.Supp. 1217, 1226 (holding requested preliminary injunction moot where there is no suggestion of plans to conduct a search of property without a warrant); *The Presbyterian Church U.S.A.) v. United States*, 870 F.2d 518, 528 (9th Cir. 1989)("[a] suit for prospective relief against official misconduct may become moot if the official action is discontinued and there is no reasonable expectation that it will recur.") IOSHA is finished with its execution of the warrant and has indicated to the state trial court that as of February 22, 2012, IOSHA has finally and fully terminated all inspection activities at Sensient's facility. There is

nothing to enjoin here. The execution of the warrant is finished. The Court should therefore dismiss Sensient's preliminary injunction as moot.

B. Sensient cannot show likelihood of success on the merits.

Even if Sensient's request for a preliminary injunction is not moot (which it is), Sensient's request for a preliminary injunction should still be denied. A party seeking a preliminary injunction must establish four elements: (1) a reasonable likelihood of succeeding on the merits; (2) it has no adequate remedy at law and will suffer irreparable harm if the request for preliminary relief is denied; (3) the threatened harm to the movant outweighs the harm the defendant may incur if injunctive relief is granted; and (4) the granting of an injunction will not disserve the public interest. *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1453 (7th Cir.1995).

1. *Reason and Jaques are entitled to qualified immunity.*

Sensient's motion for preliminary injunction fails because Sensient cannot show a likelihood of success on the merits. Sensient's exclusively bases its argument that it is likely to succeed on the merits on its Section 1983 claims against IOSHA employees Reason and Jaques. (*See* Dkt. 21, pp. 28-33.) Sensient's Section 1983 claims are not likely to succeed because Reason and Jacques possess qualified immunity.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818, (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"

Messerschmidt v. Millender, 10-704, 2012 WL 555206 (U.S. Feb. 22, 2012)(internal citations omitted). The doctrine of qualified immunity applies to administrative search warrants. *Montville v. Lewis*, 87 F.3d 900, 902 (7th Cir. 1996). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The fact that a neutral magistrate issued a warrant "is the clearest indication" that acts by government official were objectively reasonable. *Messerschmidt*, 10-704, 2012 WL 555206 (2012) (*citing United States v. Leon*, 468 U.S. 897, 922–923 (1984)).

Here, the individual defendants, Jaques and Reason are entitled to qualified immunity as they both relied on the administrative search warrant issued by the Marion County Court and reasonably confined their search activities at Sensient's facility to the terms of the warrant. (See Declarations of Jason Reason and Donna Jaques attached hereto as Exhibits A and C respectively). Accordingly, Sensient's claims are not likely to succeed on the merits.

2. *The Amended Search Warrant does not afford unbridled discretion and IOSHA officials did act beyond the scope of the Amended Search Warrant.*

Sensient is not likely to succeed on the merits because the the warrant does not afford unbridled discretion to IOSHA in violation of the Fourth Amendment. Initially, it should be noted that administrative search warrants do not have the same restrictions as criminal warrants and the requirements of administrative probable cause are less stringent than the requirements of criminal probable cause. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 320 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 534–35 (1967); *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir.1979). In addition, the Supreme Court has ruled that administrative probable cause can be demonstrated by one of two avenues: 1) if specific evidence of an existing violation is

presented, or 2) if a showing is made that reasonable legislative or administrative standards for conducting an investigation are satisfied. *Marshall v. Barlow's Inc.*, 436 U.S. at 320–21. Here, IOSHA received a referral from tOSHA that formed the basis for requesting an administrative search warrant. (See Dkt. 24-6, Exhibit E, Affidavit of Robert Kattau.) [3]

The warrant limits entry to Sensient's place of business to "regular working hours and at other reasonable times." (Dkt. 24-10, p.10.) The warrant further required the inspection and investigation must be undertaken in "a reasonable manner and to a reasonable extent." (*Id.)* As such, the warrant complies with Indiana law, which limits searches to searches at reasonable times during regular working hours or other reasonable times and requires inspections "within reasonable limits and in a reasonable manner." Ind. Code § 22-8-1.23.1; Indiana Administrative Code ("IAC") § 9-2-4. The warrant is also effectively limited in time. Pursuant to Ind. Code § 22-8-1.1-25.1(c), IOSHA cannot issue safety orders of violations more than 6 months after the violation occurs. This effectively limits execution of the warrant to a time less than six months after a violation. Finally, the Amended Search Warrant is limited in scope: "this warrant shall be limited in scope to those documents, records and areas associated with the use of flavoring substances listed as high priority in Appendix Do of the National enforcement Program, CPL 03-00-011, pages D-3 through D-13." (*Id.)* Thus, on its face the Amended Search Warrant is limited in time, manner and scope. IOSHA officials including Reason and Jaques did not have unbridled discretion to search Sensient's facility.

Moreover, Jaques and Reason did not act beyond the scope of the warrant. (See e.g. Reason Dec. and Jaques Dec, Exhibits A and B respectively.) First and foremost, Reason and

[3] At this juncture, IOSHA is not delving into the scientific merits of the HHE Report issued by NIOSH that Sensient through inadmissible and unqualified evidence attacks as based on flawed science (Dkt. 21, p. 28.) IOSHA commenced sought a warrant because of a referral by OSHA. IOSHA generally denies that it improperly used the HHE as a pretext or that IOSHA improperly coordinated the administrative search warrant with NIOSH.

Jaques conducted the search of Sensient's facilities according the terms of the Amended Search Warrant as they understood it. (Reason and Jaques Dec. ¶ 14.) Reason and Jaques always entered Sensient's facilities with the knowledge of Sensient. (Reason and Jaques Dec. ¶ 12.) Moreover, Reason and Jaques were always complied with Sensient's demands that they be escorted at all times. (Reason and Jaques Dec. ¶ 13.) As the Declarations of both Reason and Jaques show, Reason and Jaques complied with all of Sensient reasonable (and unreasonable) demands regarding use of certain electronic equipment in flammable areas even when Sensient and its attorneys did abide by the same restrictions that Sensient placed on IOSHA. (Reason and Jaques Dec. ¶ 9.)

IOSHA also limited its testing to that which was authorized in the Amended Search Warrant. (Reason and Jaques Dec. ¶ 14.) Sensient takes issue with Reason's use of air dust sampling. The only reason air dust sampling methods were used is because Sensient stated that the area tested, the dry-blend area, was used to process "high priority" chemicals. (Reason Dec. ¶ 5.) Reason was forced to use the manner of testing because Sensient did not provide production schedules indicating when the chemicals that are part of the national emphasis program would be used. (*Id.)* Consequently, Reason used an air sample technique in hopes that Sensient had used a chemical that was part of the National Emphasis Program on that particular day and the air sample would show the concentration of the chemical in the air. (*Id.*) When it turned out that the no such chemicals were used, the laboratory analyzed respirable dust as there was nothing else to test for. (*Id.*)

In short, the evidence shows that IOSHA employees at all times acted pursuant to the scope of a lawfully issued warrant. IOSHA employees did not exceed the authority provided by the warrant.

3. *IOSHA did not retaliate against Sensient for petitioning the Courts.*

Sensient argues that it is likely to succeed on the merits of its Section 1983 claim because IOSHA allegedly retaliated in violation of Sensient's First Amendment rights when Sensient petitioned the courts. (Dkt. 21, p. 32.) In order to prevail on such a claim, Sensient must show (1) it engaged in activity protected by the First Amendment, (2) Sensient suffered a deprivation that is likely to deter First Amendment activity in the future, and (3) the First Amendment activity was a "motivating factor" in defendants' alleged retaliation. *Bridges v. Gilbert*, 557 F.3d 541, 553 (7th Cir. 2009). Sensient cannot prevail on these elements.

Here, the evidence shows that IOSHA did not retaliate against Sensient for seeking redress to the Courts. Quite the opposite. After Sensient sought remedies in court, IOSHA continued to extend courtesies to Sensient that IOSHA was not required to give – like advance notice to Sensient of tests that would be performed at Sensient's facility, providing information to assist Sensient's parallel testing, issuing document requests to allow Sensient attorneys to review information prior to inspection, and accommodating Sensient's requests (although sometimes unreasonable) regarding use of electronic devices and constant escorting of IOSHA personnel. (Reason Dec. ¶¶ 6, 8, 9, 13.) IOSHA did not retaliate for Sensient's petitions to the Courts, but continued to execute the warrant according to its terms. (Reason and Jaques Dec. ¶ 14.)

Sensient also cannot prevail because it cannot show that anything IOSHA did in fact chill its First Amendment rights to seek redress in the courts. *Columbo v. O'Connell*, 310 F.3d 115, 117 (2d. Cir. 2002). In order for a First Amendment retaliation claim to succeed, there must be an "actual, nonspeculative chilling effect" on exercise of First Amendment rights. *Id.*; *Acevedo v. Surles*, 778 F.Supp. 179, 184 (S.D.N.Y. 1991) (*citing Davis v. Village Park II Realty Co.*, 578 F.2d 461, 463–64 (2d Cir.1978) (*citing Laird v. Tatum*, 408 U.S. 1, 13–14 n. 7 (1972); ("It is not enough

for Acevedo and Nunnery to prove that OMH sought to chill the plaintiffs from exercising their First Amendment rights. Plaintiffs must also prove that their First Amendment rights were actually chilled.")

Here the record clearly shows that there has been not chilling effect on Sensient's rights to petition to the Courts.[4] Sensient's First Amendment claims related to redress in the courts are not likely to succeed on the merits.

C. Sensient cannot show irreparable harm.

Sensient attempts to circumvent the showing of irreparable harm by arguing no such showing is needed when constitutional rights are at stake. (Dkt. 21, p. 33.) This argument is overbroad. "When violations of constitutional rights are alleged, further showing of irreparable injury may not be required if what is at stake is not monetary damages." *Back v. Carter*, 933 F.Supp. 738, 754 (N.D.Ind. 1996); *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F.Supp. 1016, 1031–32 (W.D.Wis.1989) ("Where violations of constitutional rights are alleged, further showing of irreparable injury may not be required *if more than money is at stake* ") (emphasis added); *Kennedy–Kartheiser v. Board of Educ. of City of Chicago*, 1987 WL 17164, at *1 (N.D.Ill. 1987); *see also Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir.1989) ("Constitutional harm is not necessarily synonymous with the irreparable harm necessary for issuance of a preliminary injunction.") The Seventh Circuit has held that no harm existed in a First Amendment retaliation action where the only injury was monetary. *Smart v. Board of Trustees of Univ. of Illinois*, 34 F.3d 432, 435 (7th Cir. 1994).

Here, there is nothing more than money at stake. As discussed, IOSHA has completed its search under the terms of the warrant. Consequently, there is no risk of continuing or future

[4] See IOSHA's Motion to Dismiss on abstention grounds regarding Sensient's ongoing efforts to seek redress in the Courts.

injury that cannot be compensated by money damages alone. The available of money damages to fully compensate Sensient for alleged injuries (subject to the defenses of IOSHA, Reason and Jaques including qualified immunity) shows Sensient is not irreparably harmed. *See e.g. Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984).

D. The public interest favors denying Sensient's motion.

The public interest weighs heavily against the grant of a preliminary injunction against IOSHA's execution of the warrant. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). When an injunction is requested against government regulation of public health, courts should not enter an injunction "unless persuaded that the plaintiff has a good chance, not merely a nonneglible one, of winning when the case is fully tried." *Illinois Psychological Assoc. v. Falk*, 818 F.2d 1337, 1340 (7th Cir. 1987).

IOSHA is charged with protecting the health and safety of Indiana workers. *See e.g. LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1253 (Ind. 2000). IOSHA's mandate stems from a state plan adopted under 29 U.S.C. § 667 that is approved and monitored by the OSHA. The state plan must meet federal standards for OSHA set by congress. 29 U.S.C. § 667. In adopting the statutory scheme governing OSHA, the Congress emphasized the critical importance of regulations protecting workers "to protect the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b).

In the public interest, IOSHA sought and executed an administrative search warrant based on a referral from OSHA. IOSHA's execution of the warrant is to investigate chemicals

used in Sensient's manufacturing process to ensure that Sensient's employees are not incurring deleterious health effects from inhaling vapors or other substances related to Sensient's manufacturing process. To fulfill its mandate of protecting Indiana workers, IOSHA received a judicially issued warrant (that was contested by Sensient) and executed the warrant pursuant to its terms under very difficult circumstances. These critical public interests in protecting worker safety weigh heavily against Sensient's complaints that do not rise to the level of a constitutional violation. The public interest weighs in favor of rejecting Sensient's request for a preliminary injunction.

E. The balance of harms favors IOSHA.

In considering the balance of harms, the court weighs the harm that the nonmoving party will suffer if the preliminary injunction is granted against the harm the moving party will suffer if the injunction is denied. *Ty, Inc v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). "This process involves engaging in what we have term the sliding scale approach; the more likely the plaintiff will succeed on the merits, the less the balance of irreparable harms need to favor the plaintiff's position." *Id.* Here, as discussed, *supra*, Sensient cannot show irreparable harm. IOSHA has completed its execution of the warrant. At best, Sensient is left with a claim for money damages for conduct that did not violate the Constitution. This, weighed against IOSHA's mandate to protect Indiana's workers' health and safety is insufficient to warrant a preliminary injunction. The balance of harms favors denial of a preliminary injunction.

IV. Conclusion

For the foregoing reasons, IOSHA requests that the Court deny Sensient's Motion for Preliminary Injunction.

Respectfully Submitted,
GREGORY F. ZOELLER
Attorney General of Indiana

Dated: February 24, 2012

By: */s/ Don R. Hostetler*

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SENSIENT FLAVORS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:11-CV-1622-JMS-DML**
	)	
INDIANA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, JASON REASON, DONNA JAQUES, KATHLEEN KREISS, JEAN COX-GANSER, CHRIS PIACITELLI, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, and AZITA MASHAYEKHI	)	
	)	
Defendants.	)	

DECLARATION OF JASON REASON

I, Jason Reason, am an adult competent to testify, have personal knowledge of the facts listed below, and declare under the penalties of perjury that:

1. I have been employed by the Indiana Occupational Safety and Health Administration ("IOSHA") as a Compliance Safety and Health Officer ("CSHO") since May 1, 2000.

2. In my capacity as a CSHO, I conduct IOSHA investigations of businesses when administrative search warrants have been issued by courts. As a CSHO, I inspect business facilities according to administrative search warrants issued by courts. I rely on warrants issued by courts in determining when and where I conduct searches of the various businesses that are subject of a particular warrant. I make every reasonable attempt to ensure that searches by

EXHIBIT
A

IOSHA are strictly governed by the terms of the warrant and that searches conducted by IOSHA do not go beyond what a warrant allows.

3. I was primarily responsible for conducting the inspections of the Sensient Flavors LLC's ("Sensient") facility in Indianapolis pursuant to a warrant issued by the Marion County Court. When I reviewed the warrant before executing searches, there was nothing in the warrant that caused me to question the warrant's validity. I relied on the warrant to conduct searches of Sensient. After I received the warrant, IOSHA tested for certain chemicals identified by the United States Department of Labor's Occupational Health and Safety Administration's National Emphasis Program ("NEP"). Sensient utilizes certain chemicals included in the NEP in its manufacture of certain food flavorings. However, based on Sensient's provided production schedules, Sensient does not use every chemical identified on the NEP on a daily basis. In fact, I was not always able to determine whether or not any of the chemicals would be used on a particular day because Sensient did not always provide production schedules or accurate production schedules showing the chemicals that would be used on particular dates on a timely basis. As a result, there were a number of days when IOSHA did not test for the chemicals identified in the NEP. IOSHA could not reasonably test random areas at Sensient without knowledge of whether the chemicals that were subject of the search warrant were being used on a particular day. I never stated to anyone that IOSHA's execution of the warrant on Sensient Flavor's LLC was a continuation of prior NIOSH inspections. Sensient's representations to the contrary are simply wrong. In fact, I did not have contact with NIOSH regarding Sensient until after September 15, 2011.

4. I do not recall informing Sensient that IOSHA would not be on site on September 15, 2011. Warning the target of a search warrant or generally giving a target notice of what they

can expect is contrary to accepted practice and state law (Ind. Code § 22-8-1.1-24.2 and 610 IAC 9-2-7) because the execution of a warrant is compromised when targets have advance notice. For this reason, IOSHA did not generally provide Sensient with advance notice regarding the specifics of testing activity that IOSHA would be conducting in subsequent days until I had authority from the Commissioner pursuant to Ind. Code § 22-8-1.1-24.2 and 610 IAC 9-2-7 as it is a Class B Misdemeanor.

5. On October 6, 2011, I took personal air samples of employee's breathing zones in the dry blend area of the Sensient facility. At this point in the investigation, Sensient was not cooperating and informing me when they were running "high priority" chemicals. It was later when the Honorable Judge Grant Hawkins ordered Sensient to provide production schedules to IOSHA that proper air sampling techniques and methods could be used. Many of the flavoring chemicals have different sampling methods and devices used for proper sampling protocol. Sensient officials, attorneys, and employees informed me that the dry blend area was used to process "high priority" chemicals. I chose to sample in this area as a last effort to obtain air sampling data in hopes that Sensient would provide information on the chemicals used that day in the area and that the sampling method that I used was appropriate. Unfortunately, approximately 4 days later Sensient stated that no "high priority" chemical was run on October 6, 2011 in the dry blend area. The sample was already at the lab, so I told the lab to just have it analyzed for respirable dust. This kind of hit and miss sampling was not necessary after receiving production schedules from Sensient as directed by the court.

6. As a courtesy because Sensient was conducting side by side testing of chemicals used at Sensient's place of business, Sensient was, at times, provided with advance notice of testing by my superiors in order that Sensient's consultants could set up their testing equipment.

This notice was provided as a courtesy only by my superiors and is not required. Occasionally, plans deviated from stated intentions based on various logistical factors and Sensient's production schedules. The deviations from stated schedules were based on evolving facts and production schedules. I never made any statements to Sensient regarding testing procedure and dates to deceive Sensient in any way. In fact, I provided Sensient's consultants with the sampling method that I was using during my sampling which is not required by OSHA standards and was going above and beyond just courtesy. Because my superiors provided Sensient with advance notice as a courtesy when they reasonably could provide notice, Sensient attempted to turn courtesies that were granted to them into a right of advance notice that limited IOSHA's authority to inspect pursuant to the terms of the warrant. My superiors only provided a courtesy notification to Sensient when such a courtesy would not adversely affect IOSHA's inspection of Sensient's facility. There were times when advance notice was simply not practicable based on the circumstances.

7. There were times when I insisted that I be permitted to perform my inspection under the warrant in instances where personnel from Sensient or their attorneys were hindering my inspection work. However, I was professional and polite at all times. I did state that I would call the police when Sensient would interfere with my investigation as I was following the protocol in the Indiana Field Inspection Reference Manual which is an IOSHA guidance document used by all CSHOs in Indiana.

8. I began giving deadlines on document requests because Sensient and their attorneys were not providing any of the documentation specifically requested on document request forms. Again, I was being courteous and not rifling through file cabinets which allowed

Sensient and their attorneys to review the documentation before they provided the documents to me for trade secret information as they expressed concern for confidentiality of trade secrets.

9. There were times when Sensient personnel maintained that certain testing equipment that included flash photographs and other electronic equipment were not safe in areas that Sensient stated were flammable areas. I questioned Sensient's statements in this regard because I observed Sensient personnel and their attorneys also using flash photography and cell phones in the exact same areas at the exact same time where Sensient maintained it was unsafe to use such equipment. Sensient's attorneys and management personnel even continued to use cell phones and flash photography in those areas as recent as the week of February 20th, 2011. However, after Sensient made such requests, I ceased using that specific equipment for the rest of that day as they never brought the issue up again and they themselves were using flash photography and cell phones. Furthermore, Sensient never requested IOSHA to stop using a velometer on October 4, 2011 or on any other date. Industry standards also indicate that there are no hazards associated with using the velometer, cell phone, calculator, or camera in those areas.

10. Neither I nor anyone from IOSHA ever prohibited any Sensient personnel or their attorneys to be on Sensient's property during the search. The only limitation on Sensient personnel and their attorneys placed by IOSHA related to interviews of non-management employees. Sensient personnel were not entitled to participate in interviews of Sensient production workers so that IOSHA could obtain needed information from the production workers without the intimidating presence of Sensient management and their attorneys. Furthermore, 610 IAC 9-2-4 authorizes the CSHO to question employees privately during an investigation.

11. Both the union officials and the employees stated to me that they felt like they were being harassed by Sensient and their attorneys after interview statements were taken by me. Based on my interviews with employees, non-management employees are being made to believe that the need legal counsel present during the interviews by the CSHO. Employees told me that Sensient attorneys have offered their legal services free of cost which is unheard of since IOSHA only has jurisdiction over employers and not employees. However, I never interfered with Sensient's attempts to talk to its employees after I conducted interviews with the employees.

12. Neither myself nor other IOSHA personnel who executed the search warrant ever entered Sensient's facility without the knowledge of Sensient. IOSHA personnel always went through the front door and we always identified ourselves on request. IOSHA officials did not sign in at Sensient's front desk because the sign-in sheet had certain legal disclaimers that I was not comfortable signing. I informed Sensient personnel regarding the reasons why IOSHA personnel would not sign the sign-in sheet.

13. Sensient officials demanded to escort Kyle Slade (CSHO) and myself everywhere and more recently even to the bathroom. The only time that I recall being unescorted after Sensient demanded that I be escorted at all times was on October 6, 2011 when I wanted to leave for lunch and all of my contacts with Sensient and Sensient's attorney had left for lunch. I walked from the office to the lobby and left for lunch on my own. However, I informed the secretary I was leaving for lunch and would be back in an hour.

14. In conducting the search of Sensient's facility, I, at all times, made every attempt to ensure that I conducted the search according to the terms of the warrant issued by the Marion County Court. I never knowingly took any actions at Sensient's facility that was contrary to the

terms of the warrant. I utilized my experience and best judgment in conducting the search of Sensient's facility according to the search warrant as I understood it.

I declare, under the penalties for perjury, that the above representations are true and correct.

2/23/12
Date:

Jason Reason
IOSHA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

SENSIENT FLAVORS, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:11-CV-1622-JMS-DML**
	)	
INDIANA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, JASON REASON, DONNA JAQUES, KATHLEEN KREISS, JEAN COX-GANSER, CHRIS PIACITELLI, NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, and AZITA MASHAYEKHI	)	
	)	
Defendants.	)	

DECLARATION OF DONNA JAQUES

I, Donna Jaques, am an adult competent to testify, have personal knowledge of the facts listed below, and declare under the penalties of perjury that:

1. I have been employed by the Indiana Occupational Safety and Health Administration ("IOSHA") as a Compliance Safety and Health Officer ("CSHO") since August of 2011.

2. In my capacity as a CSHO, I conduct IOSHA investigations of businesses when administrative search warrants have been issued by courts. As a CSHO, I inspect business facilities according to administrative search warrants issued by courts. I rely on warrants issued by courts in determining when and where I conduct searches of the various businesses that are subject of a particular warrant. I make every reasonable attempt to ensure that searches by

IOSHA are strictly governed by the terms of the warrant and that searches conducted by IOSHA do not go beyond what a warrant allows.

3. I assisted CSHO Reason during the inspections of the Sensient Flavors LLC's ("Sensient") facility in Indianapolis pursuant to a warrant issued by the Marion County Court. When I reviewed the warrant before executing searches, there was nothing in the warrant that caused me to question the warrant's validity. I relied on the warrant to conduct searches of Sensient. After I received the warrant, IOSHA tested for certain chemicals identified by the United States Department of Labor's Occupational Health and Safety Administration's National Emphasis Program ("NEP"). I never stated to anyone that IOSHA's execution of the warrant on Sensient Flavor's LLC was a continuation of prior NIOSH inspections. Sensient's representations to the contrary are simply wrong. In fact, I did not have any contact with NIOSH regarding Sensient.

4. I did not inform Sensient that IOSHA would not be on site on September 15, 2011. I do not recall CSHO Reason stating to anyone at Sensient that we would not be onsite after we obtained the warrant on September 15, 2011.

5. On October 6, 2011, I witness CSHO Reason taking personal air samples of employee's breathing zones in the dry blend area of the Sensient facility. At this point in the investigation, Sensient was not cooperating and informing me when they were running "high priority" chemicals. It was later when the Honorable Judge Grant Hawkins ordered Sensient to provide production schedules to IOSHA that proper air sampling techniques and methods could be used. Many of the flavoring chemicals have different sampling methods and devices used for proper sampling protocol. I heard Sensient officials, attorneys, and employees state that the dry blend area was used to process "high priority" chemicals. CSHO Reason chose to sample in this

area as a last effort to obtain air sampling data in hopes that Sensient would provide information on the chemicals used that day in the area and that the sampling method that I used was appropriate. Unfortunately, approximately four days later Sensient stated that no "high priority" chemical was run on October 6, 2011 in the dry blend area.

6. I never made any statements to Sensient regarding testing procedure and dates to deceive Sensient in any way.

7. There were times when I witnessed instances where personnel from Sensient or their attorneys were hindering my inspection work. However, CSHO Reason and I were professional and polite at all times.

8. I witnessed CSHO Reason provide Sensient and their attorneys with document requests that Sensient was slow to respond responsive documentation.

9. There were times when Sensient personnel maintained that certain testing equipment that included flash photographs and other electronic equipment were not safe in areas that Sensient stated were flammable areas. I observed Sensient personnel and their attorneys also using flash photography and cell phones in the exact same areas at the exact same time where Sensient maintained it was unsafe to use such equipment. Sensient's attorneys and management personnel even continued to use cell phones and flash photography in those areas after October 6, 2011. However, after Sensient made such requests, I ceased using that specific equipment for the rest of that day as they never brought the issue up again and they themselves were using flash photography and cell phones. Furthermore, I never heard Sensient request IOSHA to stop using a velometer on October 4, 2011 or on any other date.

10. Neither I nor anyone from IOSHA ever prohibited any Sensient personnel or their attorneys to be on Sensient's property during the search. The only limitation on Sensient

personnel and their attorneys placed by IOSHA related to interviews of non-management employees. Sensient personnel and their attorneys were not entitled to participate in interviews of Sensient production workers so that IOSHA could obtain needed information from the production workers without the intimidating presence of Sensient management and their attorneys. Furthermore, 610 IAC 9-2-4 authorizes the CSHO to question employees privately during an investigation.

11. Both the union officials and the employees stated to me that they felt like they were being harassed by Sensient and their attorneys after interview statements were taken by me. Based on the interviews with employees that I participated in, non-management employees, are being made to believe that the need legal counsel present during the interviews by the CSHO. Employees told me that Sensient attorneys have offered their legal services free of cost which is unheard of since IOSHA only has jurisdiction over employers and not employees. However, I never interfered with Sensient's attempts to talk to its employees after I conducted interviews with the employees.

12. Neither myself nor other IOSHA personnel who executed the search warrant ever entered Sensient's facility without the knowledge of Sensient. IOSHA personnel always went through the front door and we always identified ourselves on request. IOSHA officials did not sign in at Sensient's front desk because the sign-in sheet had certain legal disclaimers that I was not comfortable signing. CSHO Reason informed Sensient personnel regarding the reasons why IOSHA personnel would not sign the sign-in sheet.

13. Sensient officials demanded to escort CSHO Reason and myself everywhere. The only time that I recall being unescorted after Sensient demanded that I be escorted at all times was on October 6, 2011 when I wanted to leave for lunch and all of my contacts with Sensient

and Sensient's attorney had left for lunch. I walked from the office to the lobby and left for lunch on my own. However, I informed the secretary I was leaving for lunch and would be back in an hour.

14. In conducting the search of Sensient's facility, I, at all times, made every attempt to ensure that I conducted the search according to the terms of the warrant issued by the Marion County Court. I never knowingly took any actions at Sensient's facility that was contrary to the terms of the warrant. I utilized my experience and best judgment in conducting the search of Sensient's facility according to the search warrant as I understood it.

I declare, under the penalties for perjury, that the above representations are true and correct.

2/24/2012
Date:

Donna Jaques
IOSHA

STATE OF INDIANA)
)SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT 1
CAUSE NO.: 49G05-1109-MC-002441

IN THE MATTER OF A SEARCH WARRANT
REGARDING THE FOLLOWING REAL ESTATE:

SENSIENT FLAVORS, INC.,
5600-5700 W. Raymond Street,
Indianapolis, Indiana.

FILED
8 FEB 22 2012
Elizabeth A. White
CLERK OF THE MARION CIRCUIT COURT

NOTICE OF EXECUTION

Comes now, the Indiana Department of Labor, by counsel, Julie C. Alexander, Deputy Attorney General, and hereby files this Notice of full Execution of the Amended Search Warrant issued by this court on September 15, 2011.

IOSHA will not undertake any further searches of Sensient's facilities under the authority of the Amended Search Warrant dated September 15, 2011.

Respectfully submitted,

Gregory F. Zoeller
Indiana Attorney General
Atty No. 1958-98

By: J. Alexander
Julie C. Alexander
Deputy Attorney General
Atty. No. 25278-49

Indiana Department of Labor
402 West Washington Street, W-195
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Email: Julie.alexander@atg.in.gov

OFFICIAL CERTIFIED COPY
TRUE AND COMPLETE
2/22/12
CLERK OR DEPUTY
ELIZABETH A. WHITE CLERK OF COURT

EXHIBIT
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Execution has been duly served upon the following, by United States Mail, first class, postage prepaid, this 22nd day of February, 2012:

Mark S. Kittaka
Barnes & Thornburg LLP
600 One Summit Square
Fort Wayne, IN 46802

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